

#124

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW MEXICO

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4 BEN EZRA, WEINSTEIN, AND :

5 COMPANY, INC. :

6 Plaintiff, :

7 v. : CIV 97-0485 LH/LFG

8 AMERICA ONLINE, INC., :

9 Defendant. :

10 - - - - - X

11 Washington, D.C.

12 Wednesday, January 20, 1999

13 Teleconference before The Honorable
14 Lorenzo F. Garcia in the above-entitled matter,
15 taken at the offices of Hogan & Hartson, 555 13th
16 Street, N.W., Washington, D.C., at 10:40 a.m.,
17 Wednesday, January 20, 1999, and the proceedings
18 being taken down by Stenotype by MARY GRACE
19 CASTLEBERRY, RPR, and transcribed under her
20 direction.

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1 P R O C E E D I N G S

2 JUDGE GARCIA: Good morning,

3 Mr. Aguilar.

4 MR. AGUILAR: Good morning, how are
5 you?

6 JUDGE GARCIA: Very well, thank you.
7 Mr. Carome?

8 MR. CAROME: Good morning, how are
9 you?

10 JUDGE GARCIA: Very well. Mr. Jain?

11 MR. JAIN: Yes, Your Honor.

12 JUDGE GARCIA: And Ms. Jehl?

13 MS. JEHL: Good morning.

14 JUDGE GARCIA: Counselors, my office
15 received a request for a telephonic conference.
16 I know you wanted to do this later but I have a
17 criminal docket starting shortly so I thought I
18 would hear what your concerns are. Mr. Aguilar,
19 is this your request?

20 MR. AGUILAR: Yes, it is, Your Honor.
21 Judge, we're out here in Washington, D.C. doing
22 the two days of depositions that were being
23 conducted under the court's order of October 30
24 of 1998. They are essentially Rule 56(f)
25 discovery depositions in five areas that the

1 court ordered the plaintiff could conduct
2 discovery.

3 The purpose of my call is that we had
4 quite a few objections yesterday to vagueness and
5 ambiguousness by the defense counsel that I
6 really let go and tried to work through. Today
7 we have two of the most important witnesses that
8 we're going to be deposing, Mr. Michael Hsu, who
9 is a senior programmer, and also Mr. Jim Hosheit,
10 and I am getting an objection almost to every
11 single question about vagueness, instructing the
12 witness that there are no questions pending. It
13 is becoming an obstructionist deposition. I have
14 offered to enter a standing objection to
15 vagueness and ambiguousness but there is a lot of
16 coaching and cueing going on of the witness.

17 JUDGE GARCIA: Mr. Aguilar, hold on for
18 a second while I get my internal file on this
19 case. One moment, please.

20 MR. AGUILAR: Thank you, Your Honor.

21 JUDGE GARCIA: I'm sorry, Mr. Aguilar.
22 Go ahead.

23 MR. AGUILAR: Anyway, what I was
24 saying, Judge, is that we are drawing so many
25 objections here as to vagueness, ambiguousness,

1 what do you mean by this, what do you mean by
2 that, that it is becoming almost impossible to
3 take this deposition.

4 The sole purpose of these depositions
5 is to discover some of the very information that
6 we don't know about what is going on and I think
7 every attempt is being made to obstruct the
8 discovery of that information.

9 I don't want to adjourn the deposition
10 to go get a court order and what I would like to
11 do is to have the court take the position here
12 that there is a blanket objection to vagueness,
13 ambiguousness, instruct counsel to quit cueing
14 the witness, allow me to get the information in
15 whatever form I can get it. It's very technical
16 sometimes, it's very difficult. It's a computer
17 software case. And I admit that sometimes my
18 questions are not the most artfully asked
19 questions but, nonetheless, we cannot be having
20 this coaching and cueing of the witnesses going
21 on and this type of obstructionist behavior.

22 I hate to raise this but I need some
23 intervention here from the court and that's why
24 I'm raising it, Your Honor.

25 JUDGE GARCIA: All right. Who is going

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1 to respond for America Online?

2 MR. CAROME: This is Mr. Carome, Your
3 Honor. I think it's safe to say that Mr. Aguilar
4 and I have a completely different perspective of
5 what is happening here. I do not believe that
6 Mr. Aguilar has come even close to accurately
7 portraying what has happened at these
8 depositions. I have, on a number occasions,
9 objected to questions, simply saying objection,
10 vague and ambiguous. Occasionally I have said
11 vague and ambiguous and have specified a
12 particular word or words in the question that are
13 vague and ambiguous. I have never once, on that
14 basis, instructed a witness not to answer. I do
15 not think it is remotely fair to characterize
16 what I have done as coaching. I am fully aware
17 of this court's and all court's concerns with the
18 problem of speaking objections. I believe I have
19 not engaged in speaking objections. I have
20 simply stated objections to the form of the
21 question, identified the nature of the objection
22 and I have never once, except on two or three
23 occasions where there has been a legitimate claim
24 of privilege, have I instructed a witness not to
25 answer.

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1 I don't think that there is any need or
2 basis for any relief here and I take great
3 umbrage at the notion that there has been any
4 coaching going on here. The line of questions
5 which set Mr. Aguilar off here was a set of
6 questions asking the witness to draw a picture
7 and Mr. Aguilar asked four or five different
8 questions along that line, the witness said he
9 didn't understand the question, didn't understand
10 what he was being asked to draw.

11 This is highly technical material.
12 Mr. Aguilar's questions kept changing. I simply
13 stated objections on vagueness and ambiguousness
14 and I also -- I did not, at any point, instruct a
15 witness not to answer a question. So I don't
16 think that there is any call for any judicial
17 intervention here at this point.

18 MR. AGUILAR: Your Honor, I have asked
19 the court reporter to isolate for, just as an
20 example, the few pages that we're arguing over
21 right now over the drawing of a diagram and it
22 wasn't a picture. It was a diagram of how
23 information is accessed by AOL subscribers from
24 the Townsend computer database.

25 JUDGE GARCIA: Well, read the question

1 and give me the response of the court reporter as
2 identified.

3 THE REPORTER: "Question: Now, back in
4 1996, in the summer of 1996, can you describe for
5 me the process that one would go through to
6 access the stock quotes and portfolios area as an
7 AOL subscriber? Do you understand my question?

8 "Answer: Yes.

9 "Mr. Carome: I'm going to object on --

10 "Question: I would like for you to
11 draw it out for me, if you would, sir.

12 "Mr. Carome: Objection, vague and
13 ambiguous.

14 "The Witness: Drawing it out? I can
15 explain to you how to do it or I can explain to
16 you different ways they can get to that area as a
17 member. I don't know if there is any way to draw
18 that. I mean, I can list a few ways to get to
19 that area right offhand.

20 "Question: I guess what I'm doing is
21 I'm kind of a graphics guy --

22 "Answer: Well --

23 "Mr. Carome: That's not a question.

24 "Question: And so I'm trying to find
25 out if you could draw for me, if I'm sitting in

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1 Albuquerque, New Mexico at my PC and I dial that
2 up, how I get that information and what computers
3 it has to go through to give me that information.

4 "Mr. Carome: There is still no
5 question pending.

6 "Question: Can you draw that for me.

7 "Mr. Carome: Objection, vague and
8 ambiguous.

9 "The Witness: I'm still kind of lost.
10 You've mentioned two different things and I --

11 "Question: Okay. What two things did
12 I mention?

13 "Answer: You've mentioned drawing how
14 the member gets to an area.

15 "Question: Right.

16 "Answer: And then you mentioned
17 drawing a picture of how the member gets to that
18 area and what computers it goes through.

19 "Question: Great. So they're two
20 separate things?

21 "Answer: Yes.

22 "Question: So let's do first the
23 computers that it goes through, okay?

24 "Mr. Carome: Objection, vague and
25 ambiguous. There is no question pending.

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1 "The Witness: I actually do not know
2 what computers they go through to get to the
3 information.

4 "Question: You don't?

5 "Answer: No, I don't. If I can ex --

6 "Mr. Carome: There is no question
7 pending.

8 "Question: Yes, you can explain. Go
9 ahead.

10 "Answer: You have computers within the
11 telephone network that I don't know about, you've
12 got computers in the AOL network that I don't
13 know about. The AOL Internet network. Once it
14 gets past like the phone company, the long
15 distance carriers, the Internet providers that we
16 may have subcontracted to, you've got computers
17 within the complex itself that I really do not
18 have any clue as to what computers it goes
19 through, unless you can be very specific.

20 "Question: Well, like one of the
21 people we talked to yesterday told me about a
22 Stratus computer.

23 "Answer: Okay.

24 "Question: Do you know what that is?

25 "Answer: Yes, I do.

1 "Question: What is a Stratus
2 computer?

3 "Answer: It's basically a piece of
4 hardware that a company called Stratus provides
5 AOL. It is a redundant system that's fault
6 tolerant. It provides its own backup basically.

7 "Question: Is that one of the pieces
8 of equipment that an inquiry would have to go
9 through or be routed to?

10 "Mr. Carome: Objection, vague and
11 ambiguous and hypothetical.

12 "The Witness: Which area of our
13 service are you pertaining to?

14 "Question: The quotes and portfolios
15 area where you can get a stock quote.

16 "Answer: Yes.

17 "Question: So the answer is yes?

18 "Answer: The answer is yes.

19 "Question: Do you know what the
20 Townsend computers are?

21 "Answer: Yes, I do.

22 "Question: What are the Townsend
23 computers?"

24 JUDGE GARCIA: That's enough. As I
25 understand the objection, Mr. Aguilar, you're

1 saying that Mr. Carome is coaching the witness by
2 his objections?

3 MR. AGUILAR: Yes, Your Honor, and he's
4 also posing objections to almost every question
5 on the basis of vague and ambiguous even when the
6 witness understands the question.

7 JUDGE GARCIA: What were the parties'
8 agreements at the commencement of the deposition
9 concerning preservation of objections?

10 MR. CAROME: There were no agreements
11 to that effect, Your Honor. That was not
12 discussed.

13 JUDGE GARCIA: So you've waived all
14 objections as to form of the question?

15 MR. AGUILAR: That's correct.

16 JUDGE GARCIA: Now, the cases that I
17 follow in reference to discovery disputes of this
18 nature are America Hangar, Inc. versus Basic
19 Line, Inc. You will find that at 105 Federal
20 Rules Decisions 173 and the International Union
21 of Electrical Radio and Machinists versus
22 Westinghouse and that is found at 91 Federal
23 Rules Decisions 277. Both of those cases stand
24 for the proposition that instructions not to
25 answer are improper. The only exceptions are

1 those that are contained in this International
2 Union of Electrical Radio and Machine Workers
3 that I indicated and those are limited.

4 You may instruct the witness not to
5 answer when the question deals with trade secrets
6 or privileged information and, in such an event,
7 when providing the answer would disclose a
8 privilege, it is appropriate to instruct a
9 witness not to answer but then it is incumbent to
10 follow up on a motion for protective order, or
11 secondly, if the question goes beyond a
12 limitation previously imposed by the court, for
13 example, as in this case, I have limited
14 discovery to certain discrete areas and you may
15 not instruct a -- I'm sorry, you may instruct a
16 witness not to answer if examining counsel is
17 going beyond the scope of authorized discovery.
18 It is improper to instruct a witness not to
19 answer for other reasons, it is improper to
20 object as to relevancy.

21 On these other questions, if you have
22 preserved, for purposes of trial, the form of the
23 question, you may state the objection as you
24 have, vague or ambiguous, but then you must tell
25 the witness to answer the question. Clearly the

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1 deponent in this case, in at least some of these
2 questions, understood the question and wasn't
3 troubled by the vagueness or ambiguity of the
4 question but, nonetheless, once the objection was
5 interposed, the witness then either didn't answer
6 or determined that what was previously an
7 unambiguous question was becoming ambiguous.

8 MR. CAROME: Your Honor, may I
9 interject?

10 JUDGE GARCIA: No. Just a second.

11 MR. CAROME: I'm sorry.

12 JUDGE GARCIA: What we're supposed to
13 be doing today, counselors, is set out in a
14 decision called Hall versus Clifton Precision.
15 In that case, the court said that the purpose of
16 a deposition is to find out what a witness saw,
17 heard or did, to find out what the witness
18 thinks. A deposition is meant to be a
19 question-and-answer conversation between deposing
20 lawyers and witnesses. There is no need for the
21 witness' own lawyer to act as an intermediary,
22 interpreting questions, deciding which questions
23 a witness should answer and helping the witness
24 to formulate answers. The witness comes to the
25 deposition to testify and not to indulge in a

1 parody of Charlie McCarthy with lawyers coaching
2 or bending the witness' words to mold the legally
3 convenient record.

4 That's the position that I'm going to
5 take in reference to motions that arise
6 subsequent to this deposition.

7 Just some guidance, allow the witness
8 to respond. You may object if you have a concern
9 over the form of the question but discovery is to
10 be taken subject to the objections. So if you
11 believe that the question is indeed vague or
12 ambiguous, you may state your objection but then
13 the witness must be instructed to answer the
14 question.

15 If the witness is unable to understand
16 the question because the witness believes it is
17 not understandable, and indeed some of the
18 questions posed by Mr. Aguilar that were read
19 back by the court reporter fall into that
20 category and the witness so indicated, then it's
21 proper for the witness to state that he or she
22 doesn't understand the question and Mr. Aguilar
23 can rephrase that.

24 Apart from that, instructions not to
25 answer should not be given and non were presented

1 during this one interchange, unless it comes
2 within those areas of the American Hangar case;
3 that is, privilege or it goes beyond the scope of
4 discovery authorized by the court.

5 Now, I shut you off when you said you
6 wanted to make a statement. Go ahead, Counselor.

7 MR. CAROME: Thank you, Your Honor. - I
8 apologize for interrupting. I simply wanted to
9 make clear that, and I think it's not clear that
10 Your Honor understands this. I have never
11 instructed a witness not to answer a question
12 during any of these depositions on grounds of
13 vagueness or ambiguousness and I have only -- the
14 only -- and it's been probably less than five
15 occasions in three depositions now where I have
16 instructed a witness not to answer and that has
17 always been on only legitimate privilege grounds.

18 JUDGE GARCIA: And I have not made a
19 finding to that effect. I have not found that
20 the objection was improper, I have not found that
21 you have coached the witness, nor have I found
22 that you have instructed the witness not to
23 answer. What I am giving are general principles
24 that are applicable to depositions.

25 Mr. Aguilar, if the witness or counsel

1 are having trouble with a question, rephrase it
2 so it is understandable. And if the witness
3 doesn't understand the question, he or she is
4 privileged to state they don't understand it and
5 ask you to rephrase it. You have waived
6 objections except as to the form of the question
7 so it is proper to state the objection so that
8 examining counsel is alerted to the fact that the
9 question is unclear. But when such an objection
10 is advanced, the witness must nonetheless answer
11 the question. So if you do state, you know,
12 "Objection, vague, ambiguous," you've reserved
13 your objection but then have the witness answer
14 the question.

15 MR. AGUILAR: And I don't have any
16 problem with that, Judge, and I have been
17 rephrasing questions for two days now. So I will
18 continue to do that. What I object to is the
19 repeated interjection of a vagueness and
20 overbroad objection to questions that obviously
21 the witness understood and that is being used to
22 alert the witness in some fashion and that's what
23 I'm objecting to.

24 JUDGE GARCIA: Well, that's improper.
25 A witness is not to be coached in this

1 proceeding. And if the court determines that
2 that is the ulterior purpose of stating an
3 objection, I will have no hesitancy to impose
4 sanctions. So let's get to the facts of this
5 case and the limited areas that have been
6 authorized and proceed with getting the
7 deponents' testimony on the record.

8 MR. AGUILAR: Thank you, Your Honor.

9 JUDGE GARCIA: Anything further,
10 Mr. Aguilar?

11 MR. AGUILAR: No, Your Honor.

12 JUDGE GARCIA: And on behalf of America
13 Online, Mr. Carome, anything further?

14 MR. CAROME: No, Your Honor. Thank you
15 very much.

16 JUDGE GARCIA: Okay, Counselor. As I
17 said, I have a criminal docket this morning but
18 if there are further problems, I'm available
19 later on this morning.

20 MR. AGUILAR: Thank you, Your Honor.

21 (Whereupon, at 10:50 a.m., the
22 teleconference was concluded.)
23
24
25

CERTIFICATE OF REPORTER

I, **MARY GRACE CASTLEBERRY**, hereby certify that I am the official court reporter who reported to the best of my ability and thereafter reduced to typewriting under my direction the proceedings in the foregoing matter.

That I am neither counsel for, related to, nor employed by any of the parties to this matter. I further certify that I am not a relative nor employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of this matter.

Mary Grace Castleberry